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In the Supreme Court of the United States

OCTOBER TERM, 1982

RONALD R. HUDSON,

Petitioner,

vs.

SUSAN HUDSON,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO REVIEW JUDGMENT OF THE SUPREME COURT OF INDIANA

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I. Question Presented for Review.

Petitioner (husband), a domiciliary of Oregon and a resident of Spain, was served with notice of Respondent's (wife) Indiana action for dissolution of marriage and determination of custody of the parties' children. Petitioner filed a special appearance in the Indiana trial court and moved to dismiss the action, as it pertained to custody and property matters, for lack of personal jurisdiction. The trial court held that it had jurisdiction to enter a decree on both the dissolution and the questions of custody and marital property. On appeal, the Court of Appeals of Indiana, Fourth District, held that while the Indiana trial court clearly did not have personal jurisdiction over the Petitioner, personal jurisdiction is not required in a child custody determination under the Uniform Child Custody Jurisdiction Act. Petitioner now asks this Court to review the decision that personal jurisdiction over the Petitioner, as required by the Fourteenth Amendment, is not necessary to render a child custody decree by the Indiana courts.

II. Parties Concerned.

The caption of this case in this Court contains the names of all parties to the proceeding in the Supreme Court of the State of Indiana.

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V. Citations of Opinions Below

There is no formal opinion of the Supreme Court of Indiana. That court's order of August 10, 1982, denying Petitioner's "Petition to Transfer" (App. p. 26) is unreported.

The opinion and judgment of the Court of Appeals of Indiana, Fourth District (by Presiding Judge Miller; concurred in by Judges Conover and Young) as issued April 21, 1982, which affirmed in part the judgment of the trial court, is reported at ..... Ind.App. ....., 434 N.E.2d 107

(1982) (App. p. 1). The Court of Appeals' order of May 26, 1982, denying Petitioner's "Petition for Rehearing" (App. p. 27) is unreported.

There is no formal opinion of the Vigo Superior Court, Division 2. That court's Dissolution of Marriage Decree (App. p. 28), dated July 15, 1980, is unreported.

VI. Jurisdictional Statement

Jurisdiction for Respondent's dissolution proceeding, filed before the Vigo Superior Court, Division 2, State of Indiana, as that jurisdiction pertains to child custody determination, is the issue which is sought to be reviewed in this petition. On July 15, 1980, the Vigo Superior Court entered its Dissolution of Marriage Decree (App. p. 28).

From this final order, Petitioner timely sought judicial review before the Court of Appeals of Indiana. Jurisdiction was present in Petitioner's appeal by virtue of Rule 2 and Rule 4, Indiana Rules of Appellate Procedure. On April 21, 1982, the Court of Appeals of Indiana, Fourth District, entered its opinion and judgment (App. p. 1). Petitioner thereupon filed his Petition for Rehearing with the Court of Appeals which was denied by order entered May 26, 1982 (App. p. 27).

Petitioner timely filed his Petition for Transfer to the Supreme Court of Indiana (App. p. 47), which petition was denied by unpublished order dated August 10, 1982 (App. p. 26). The result of this order was to affirm the Indiana trial court's decree as it pertained to custody of Petitioner's and Respondent's children, thereby constituting a final judgment rendered by the highest court of Indiana in which a decision could be had.

This petition for review on certiorari is being submitted to this Court pursuant to 28 U.S.C. Section 1257(3).

VII. Constitutional Provisions, Statutes and Rules Involved

The Fourteenth Amendment to the United States Constitution reads:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The Uniform Child Custody Jurisdiction Act, Indiana Code 31-1-11.6-3 reads:

> Jurisdiction
>
> Sec. 3. Jurisdiction. (a) A court of this state which is competent to decide child custody matters has jurisdiction to make a child custody determination by initial or modification decree if:
>
> (1) this state (A) is the home state of the child at the time of commencement of the proceeding, or (B) had been the child's home state within six (6) months before commencement of the proceeding and the child is absent from this state because of his removal or retention by a person claiming his custody or for other reasons, and a parent or person acting as parent continues to live in this state; or
>
> (2) it is in the best interest of the child that a court of this state assume jurisdiction because (A) the child and his parents, or the child and at least one (1) contestant, have a significant connection with this state, and (B) there is available in this state substantial evidence concerning

the child's present or future care, protection, training, and personal relationships; or

(3) the child is physically present in this state and (A) the child has been abandoned or (B) it is necessary in an emergency to protect the child because he has been subjected to or threatened with mistreatment or abuse or is otherwise neglected or dependent; or

(4)(A) it appears that no other state would have jurisdiction under prerequisites substantially in accordance with paragraphs (1), (2) or (3), or another state has declined to exercise jurisdiction on the ground that this state is the more appropriate forum to determine the custody of the child, and (B) it is in the best interest of the child that this court assume jurisdiction.

(b) Except under paragraphs (3) and (4) of subsection (a), physical presence in this state of the child, or of the child and one (1) of the contestants, is not alone sufficient to confer jurisdiction on a court of this state to make a child custody determination.

(c) Physical presence of the child, while desirable, is not prerequisite for jurisdiction to determine his custody. *As added by Acts 1977, P.L. 305, Sec. 1.*

VIII. Statement of Case.

This case arose by the filing of Respondent's (hereinafter "Wife") verified petition for dissolution of marriage on March 12, 1980. This petition was filed before the Vigo Superior Court, Division 2, Terre Haute, Vigo County, Indiana.

The facts of this case reveal that Petitioner (hereinafter "Husband") and Wife were married on the 24th day of January, 1975, in Bloomington, Indiana, and lived there until June of 1976. The Petitioner has never resided in

the State of Indiana since that date. There were two children born of the marriage, plus a third child of Wife from an earlier marriage, who was adopted by Husband. After moving from the State of Indiana, the parties resided in the marital relationship in Keflavik, Iceland, and Bremerton, Washington.

On December 26, 1979, Wife returned to the residence of her parents, located in Vigo County, Indiana, along with the three children, and eventually initiated the above-referenced dissolution action. On January 12, 1980, Husband, a Lieutenant Commander in the United States Navy, was required to proceed to his new duty station in Rota, Spain. Prior to the filing of Wife's action, Husband moved the two natural children of the parties to Rota, Spain with him, after receiving repeated complaints from Wife that she was unable to properly care for them. Husband and the two children born of the marriage were neither domiciled nor were they residents of the State of Indiana at the time this action was filed.

Notice of the Indiana divorce proceeding was sent to Husband at his duty station in Spain. On April 11, 1980, Husband appeared specially by counsel and filed with the trial court his Motion to Dismiss. One of the grounds raised by this motion for dismissal was specifically the lack of personal jurisdiction over Husband (Record p. 23; App. p. 30). The issue of the trial court's lack of personal jurisdiction was further raised at the trial court level in Husband's Brief in Support of Motion to Dismiss (App. p. 32).

The trial court overruled Husband's Motion to Dismiss, that court finding that it had jurisdiction to render a child custody decree. The dissolution action was heard on final hearing, with a final decree being entered awarding custody of the parties' three children to Wife.

Husband timely filed his Motion to Correct Errors with the trial court. Among those issues being specifically reserved for decision at the appellate court level in the motion was that dealing with a lack of personal jurisdiction over the Husband (Record p. 76-77; App. p. 43).

On September 25, 1980, the trial court overruled Husband's Motion to Correct Errors and Husband's appeal to the Court of Appeals of Indiana was commenced. In that court, the following issue, *inter alia*, was raised on appeal (App. p. 2):

> . . . the trial court did not possess jurisdiction to award custody of the parties children under the Uniform Child Custody Jurisdiction Law and any such assertion of jurisdiction would violate his due process rights.

In its decision, the Court of Appeals first held that the trial court did lack *in personam* jurisdiction over Husband. In so holding, the Court of Appeals reversed that portion of the trial court's decree distributing the parties' marital property and ordering the payment of child support by Husband. Most importantly, the Court of Appeals, upon finding subject matter jurisdiction under the Uniform Child Custody Jurisdiction Act ("UCCJA"), further held that *in personam* jurisdiction over Husband was not necessary in making a child custody determination. The Court of Appeals' holding is based on the conclusions that (1) minimum contacts between Husband and forum need not be shown in that custody is an adjudication of status and falls under the status exception of *Shaffer* v. *Heitner*, 433 U.S. 186 (1977); and (2) the presence of *in personam* jurisdiction is not required under the UCCJA in any event.

Upon the denial of Husband's "Petition for Rehearing" by the Court of Appeals (App. p. 27), Husband submitted his Petition for Transfer to the Supreme Court of Indiana. Among those issues being reserved for decision by that court was that issue dealing with the lack of personal jurisdiction over Husband in the child custody determination (App. p. 48). The Supreme Court of Indiana denied Husband's petition by order dated August 10, 1982 (App. p. 26).

IX. Argument

The Indiana court—by ruling that personal or *in personam* jurisdiction over the adverse party in a child custody determination is not necessary—has effectively removed the fundamental protections of due process afforded Husband under the Fourteenth Amendment of the United States Constitution, as interpreted by this Court. The result of this decision is to allow an Indiana trial court to strip away the unarguably precious rights of a parent to custody of offspring, whereas the same court, under the same circumstances, would be without the power to render a judgment against the parent in a simple creditor-debtor lawsuit. This decision flies squarely in the face of a long line of due process decisions rendered by this Court, including *Kulko* v. *Superior Court of California*, 436 U.S. 84 (1978), *Shaffer* v. *Heitner*, 433 U.S. 186 (1977) and *May* v. *Anderson*, 345 U.S. 528 (1953).

Furthermore, the decision of the Indiana court emphasizes the confusion which is present among the various state courts on this issue. The question of personal jurisdiction in custody determinations has in the past created a virtual smorgasbord of holdings and rules relating to the necessity or degree of jurisdiction over a party required before a court may render a valid decree. The development of the Uniform Child Custody Jurisdiction Act (the Indiana version being found at Indiana Code 31-1-11.6 *et seq.*) and its promulgation by a large majority of the states, has not settled the question of personal jurisdiction in a child custody proceeding. As will be shown herein, there exists totally conflicting state court decisions

on this issue, many of these decisions having been only recently decided under the UCCJA.

This case presents to this Court a clearly defined factual situation in that the question of the existence of personal jurisdiction or minimal contacts of the Indiana court over Husband is not in dispute. The Court of Appeals of Indiana in its published opinion (App. p. 1) held that under no set of facts does there exist those certain "minimum contacts" between the state and party necessary for Indiana to exercise personal jurisdiction over Husband. The issue is thus not clouded by factual questions concerning the initial existence of personal jurisdiction. Surely the importance of the personal jurisdiction issue raised by this case as it pertains to the denial of Husband's due process rights, the conflict of the Indiana decision with earlier decisions of this Court, and the diversity of views and decisions in the various state courts stemming from a supposedly "uniform" act is worthy of this Court's scrutiny.

In holding that personal jurisdiction over Husband was not necessary for the trial court to render a child custody decree, the Court of Appeals of Indiana totally ignored the Fourteenth Amendment and the thrust of this Court's decision in *May* v. *Anderson*, 345 U.S. 528 (1953). In *May*, this Court was asked initially to determine if a Wisconsin custody decree, handed down without the trial court having acquired personal jurisdiction over the opposing parent, was binding on an Ohio court under the Full Faith and Credit Clause of the United States Constitution. This Court responded by holding that a custody decision rendered without obtaining jurisdiction over the person sought to be bound was not entitled to extraterritorial effect under the Full Faith and Credit Clause. Prior to

answering that question, however, Justice Burton, writing the plurality opinion in the case, first considered the nature of the adverse parent's rights at 345 U.S. 528, 533-534 (1953):

> . . . we have before us the elemental question whether a court of a state, where a mother is neither domiciled, resident nor present, may cut off her immediate right to the care, custody, management and companionship of her minor children without having jurisdiction over her *in personam*. Rights far more precious to appellant than property rights will be cut off if she is to be bound by the Wisconsin award of custody.
>
> • • •
>
> . . . In the instant case, we recognize that a mother's right to custody of her children is a personal right entitled to at least as much protection as her right to alimony.

Clearly the *May* case stands for the proposition that custody decisions impinging on a parent's right to custody of his or her minor offspring are *in personam* in nature, and thus require that jurisdiction over the person must be obtained.

In *International Shoe Co.* v. *Washington*, 326 U.S. 310, 316 (1945), this Court held in regard to personal jurisdiction that:

> . . . due process requires only that in order to subject a defendant to a judgment *in personam*, if he be not present within the territory of the forum, to have certain minimum contacts with it such that the maintenance of the suit does not offend "traditional notions of fair play and substantial justice."

The extension of the *International Shoe* doctrine on due process and *in personam* jurisdiction came in this Court's decision in *Shaffer* v. *Heitner*, 433 U.S. 186 (1977). In

Shaffer, the Court first discussed the requirement of the Due Process Clause and the demise of the territorial jurisdiction theory of *Pennoyer* v. *Neff*, 95 U.S. 714 (1878). The court then went on to hold at 433 U.S. 186, 212 (1977) that:

> We therefore conclude that all assertions of state-court jurisdiction must be evaluated according to the standards set forth in *International Shoe* and its progeny.

Husband implored both the trial court and the state appellate courts to follow the ruling precedent set down by *May*, *International Shoe* and *Shaffer*. The Indiana Court of Appeals and the Indiana Supreme Court have, however, refused to follow this Court's interpretation of the Due Process Clause and instead held that Wife need not demonstrate minimum contacts between Husband and the forum in custody proceedings under the UCCJA. This holding is in direct contravention with Justice Burton's opinion in *May*. The appellate court based this holding in part on its reasoning that the determination of child custody is a determination of status, much like a dissolution of marriage decree, by itself, is a determination of status. The Court of Appeals then further held that an Indiana trial court may adjudicate the question of custody under the UCCJA—and therefore totally cut off a parent's custodial rights to offspring—without the court having ever obtained personal jurisdiction over the parent given reasonable attempts to furnish notice of the proceedings. The authority relied upon by the Court of Appeals in reaching this conclusion is the so-called "status exception" of *Shaffer* v. *Heitner*, 433 U.S. 186 (1977).

In a recent case, the Ohio Supreme Court has come to the opposite conclusion on the application of the "status exception" to child custody proceedings. In *Pasqualone*

v. *Pasqualone*, 63 Ohio St.2d 96, 406 N.E.2d 1121 (1980), an Ohio couple had entered into a written separation agreement which provided that the wife could take the couple's child to Indiana, but that she could not remove the child from the two-state area of Ohio and Indiana. The wife breached this agreement by moving the child, along with herself, to Illinois. Upon arriving in Illinois, the wife commenced an action for divorce and custody of the child. The husband obtained possession of the child during a visit and commenced his own divorce action in the Ohio courts. The Illinois court was the first to render a decree and awarded custody of the child to the wife. The Ohio Supreme Court refused to enforce the Illinois custody decree as the Illinois court clearly failed to have personal jurisdiction over the husband as required by *May* v. *Anderson*, 345 U.S. 528 (1953). In so holding, the Ohio court considered the argument that custody actions are status determinations not requiring personal jurisdiction over the non-petitioning parent. The court stated at 406 N.E. 2d 1121, 1126 (1980) that:

> It is argued that *Shaffer* v. *Heitner* leaves a narrow set of cases involving status which require no further contacts with a state than the presence of the party whose status is to be determined. This category, which was first mentioned in *Pennoyer* v. *Neff* (1878), 95 U.S. 714, 24 L.Ed 565, was discussed in *Shaffer*, where the court stated, in footnote 30, at page 208, in footnote 30, 97 S.Ct., at page 2582:
>
> > "We do not suggest that jurisdictional doctrines other than those discussed in text, such as the particularized rules governing adjudication of status, are inconsistent with the standards of fairness."
>
> In *Shaffer*, though, the court did not exempt status determinations from the standards of fairness, but

> rather it stated that the presence of a party whose personal status is to be determined could constitute sufficient contact with a state for that state to fairly and justly make the determination.
>
> * * *
>
> In actuality *Shaffer* abandons traditional notions of status and of *in rem* jurisdiction in favor of considerations of fairness and substantial justice. The question becomes whether a person has sufficient contacts with a jurisdiction for that jurisdiction to fairly and justly make a determination against him on a particular matter. [Citation omitted].
>
> The Court in *May*, . . . by holding that custody decisions are *in personam* and by treating as irrelevant the technical domicile of the child, indicated that more contact than just the presence of a child's domicile in a state is required.

The totally opposite conclusions of the Indiana and Ohio decisions, coming as they do from adjacent jurisdictions, shows the confusion which exists in this area and the need for clarification by this Court.

This Court has only recently considered the effect of the *Shaffer* decision, as it applies directly to the area of family law, in *Kulko* v. *Superior Court of California*, 436 U.S. 84 (1978). The direct issue presented by the case was if due process required personal jurisdiction over an absent New York father to whom a child support obligation was to be imposed by a California court. This Court held that a forum state must have personal jurisdiction over an individual to enforce a child support judgment against him, even though the forum state is the domicile of the child and/or the custodial parent. The Court stated at 436 U.S. 84, 88 (1978) that the father's contacts with California were:

> . . . too tenuous under California's long-arm statute and the Constitution to establish the minimum nexus required under *Shaffer* and *International Shoe* for the imposition of financial obligations in a domestic relations case.

Clearly, the *Kulko* case can be seen to stand for the proposition that the due process requirements of minimal contacts and fundamental fairness, which must be present for personal jurisdiction to exist, are just as applicable to the domestic relations area as they are to the area of commercial transactions. It can be even further argued that *Kulko* requires in a family law case an even greater degree of contact between the party to be bound and the forum. This is an interpretation of *Kulko* which is shared by even those critical to the requirement of *in personam* jurisdiction in a child custody case. See, Bodenheimer and Neeley-Kvarme, *Jurisdiction Over Child Custody and Adoption After Shaffer and Kulko* (1979) 12 U.C. Davis L.Rev. 229, 231, 237-239.

By viewing both *Kulko* and *May* together, it can only logically be concluded that the requirement of personal jurisdiction over an adverse parent—as that jurisdiction is defined in the sense of *International Shoe* and *Shaffer*—must extend to include custody determinations. In *May*, the right of custody was analogized as being a personal right similar to alimony and that as such, it was entitled to as much protection as the right of alimony. This analogy, which would most certainly apply to child support payments as well, is just as valid today under the "minimum contacts" concept of jurisdiction. In short, the Indiane appellate court decision has decided this exceedingly important constitutional due process question in such a way that it directly conflicts with the above-stated decisions of this Court.

In reaching its decision that personal jurisdiction over a parent is not required in a custody proceeding, the Indiana appellate court, in addition to concluding that the *Shaffer* status exception was applicable, also holds that in any event, personal jurisdiction is not required over the adverse parent in a custody determination made under the UCCJA. The appellate court states in its opinion that (App. p. 22-23):

> The paramount issue in custody proceedings is the best interests of the child, not the feuding parents. The Uniform Act therefore focuses primarily on the state where the child and family, not a parent alone, maintain significant connections. (Footnote omitted).
>
> • • •
>
> The Uniform Act's jurisdictional provisions therefore comport with mandates of *Shaffer*. Where the petitioner has complied with the notice provisions, [footnote omitted] the assumption of jurisdiction by a forum meeting the jurisdictional provisions of the Uniform Act satisfies the "traditional notions of fair play and substantial justice" *Shaffer*, . . . embodied in the due process clause.

The UCCJA's jurisdictional provisions are found at Section 3 of the Act (Indiana version being Indiana Code 31-1-11.6-3). It is the intent of this section to provide that initial custody jurisdiction be primarily in the home state of the child; or, if this requirement cannot be met, then in the state that has the significant connection with the child and family. Bodenheimer, *Interstate Custody: Initial Jurisdiction and Continuing Jurisdiction under the UCCJA*, 14 Family L.Q. 203, 204.

Under the Indiana appellate court's interpretation of Section 3 of the UCCJA, once the Indiana trial court has met the jurisdictional provision of the Act, it need not

obtain personal jurisdiction over the parent sought to be bound by the decree. Substantial conflict exists on this issue among the various state courts that have considered it. In opposition to the Indiana position is *Pasqualone* v. *Pasqualone*, 63 Ohio St.2d 96, 406 N.E.2d 1121, 1127, wherein the Ohio Supreme Court stated that:

> In a custody case, . . . as in a child support or alimony case, it is not fair and reasonable to allow one party to bind the other party on the basis of his unilateral acts. A court must balance the conflicting interests. Although the contacts required to allow a court to make a binding custody order may not need to be as great as those required to order a payment, more contact is required than would be required in a divorce action. In this sense, *May*, in requiring jurisdiction over the person, survives today as good law.

Also in opposition to the Indiana holding is the decision of the Supreme Court of Montana in *State ex rel Muirhead* v. *District Court of First Judicial District*, 196 Mont. 535, 550 P.2d 1304 (1979). The facts of that case involved a father who had removed his children from the State of Washington after a Washington court had awarded custody of the children to the mother. The father then obtained an order in Montana awarding him custody of the children. On review, the Montana court held that absent *in personam* jurisdiction over the mother in Washington, any attempt by Montana to exercise custody jurisdiction would be in violation of wife's due process rights at law.

Other state courts have ruled similarly to the Indiana appellate court by holding that personal jurisdiction over the adverse parent is not required. Two decisions holding this are *Goldfarb* v. *Goldfarb*, 246 Ga. 24, 268 S.E.2d 648 (1980) and *In re Marriage of Leonard*, 122 Cal.App.3d 443, 175 Cal.Rptr. 903 (1981).

The UCCJA has now been adopted by almost all of the states of this union. In order for it to function as intended on a national scale, it must be interpreted uniformly. Furthermore, in order for the Act to function effectively, it must be interpreted in conjunction with this Court's decisions on due process and *in personam* jurisdiction. Without *in personam* jurisdiction, the goal of the Act towards making custody determinations based on the "best interests" of the children means nothing, since a court acting without it would be powerless to provide for the future support of the child, or to even enforce its own decrees. This case presents to this Court a situation where the decisions of the various states are clearly in confusion. The narrow and clearly defined constitutional issue in question and the seriousness of the rights being dealt with most certainly merit this Court's attention and consideration.

For all the reasons set forth above, it is respectfully submitted that Husband's petition for certiorari should be granted.

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